No. 83-1085

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN CYANAMID COMPANY,
Petitioner,

—against—

MELAMINE CHEMICALS, INC. *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER AMERICAN CYANAMID COMPANY

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Petitioner American Cyanamid Company ("Cyanamid") submits this reply brief in response to the briefs filed by Respondent Melamine Chemicals, Inc. ("MCI") and the Justice Department in connection with Cyanamid's petition for a writ of certiorari.[1]

REPLY TO RESPONDENTS' ARGUMENTS

At the urging of a non-party competitor, which seeks to perpetuate a fortuitous subsidy under a twenty-year-old Government antitrust consent decree, the Second Circuit reversed the judgment of the district court terminating that decree. The issue now before this Court is whether the Second Circuit's decision to reinstate the decree over the wishes of both parties to it, and in the

1. Cyanamid's Rule 28.1 statement contained in its original petition remains accurate.

face of the district court's reasoned conclusion that changed circumstances have caused the decree to become harmful to competition, presents sufficiently well-defined and important legal issues to warrant this Court's consideration.

In its petition, Cyanamid showed that the question raised—the proper scope for judicial inquiry when the parties jointly seek to modify or eliminate a consent decree—is an important and recurring one. Cyanamid also showed that in answering that question the Second Circuit held that the absence of conflict between the parties obliges the court to adjudicate liability under the original complaint, thereby creating by judicial fiat a new and Constitutionally unauthorized quasi-adversarial proceeding.

In their papers opposing the petition, both respondents have contended that the decision below turns on certain language peculiar to this consent decree, and is therefore too narrow to justify review by this Court. We show here that both the broad language used by the court of appeals and the result it reached belie respondents' efforts to narrow its application to the facts of this case.

I

The Decision Below Cannot Reasonably Be Narrowed As Respondents Urge.

The Government agrees with Cyanamid that the decision below is clearly erroneous; it differs only as to the scope of the precedent that has been set. It is perfectly understandable that the Government would hope that this decision will not be found generally applicable to joint motions to terminate or modify consent decrees. It has presumably taken that position in other district court proceedings subsequent to the Second Circuit opinion (Brief For the United States, hereinafter "U.S. Brief," at 9, n. 9) and would of course wish to continue to do so if this petition were denied. However, such considerations, understandable though they may be, do not lead to a correct description of what the court below has done in this case.

A. The Second Circuit Explicitly Decided The Case In Terms Of Broad Application.

In arguing that the court of appeals' decision rests only upon a provision in the decree itself, respondents either ignore or seek to brush aside that portion of the opinion (at pages A15-17) where the court holds in unambiguous terms that although Supreme Court consent decree decisions have "tended to apply principles of contract law," those precedents should not control where the parties are in agreement (A12-13). It flatly stated:

> [I]t is appropriate for the court to look beyond the words of the decree itself in situations such as this, where the parties jointly seek a modification of the decree.

(A15-16).

Having thus decided that the standard of review applicable to a modification motion may be found outside the language of the decree, the court of appeals ruled that "the criteria used for determining a Clayton Act violation are applicable here" (A17). This conclusion followed, in the view of the Second Circuit, because "the purpose of Part XI" was to address the Government's Clayton Act concerns (A17). In other words, the court held that because the relief in Part XI related to an alleged Section 7 violation, the mandatory annual purchases could not later be terminated on consent of the parties until it is determined whether any Section 7 violation exists. The district court's assessment of the present-day competitive effect of that remedy was held to be insufficient because it did not include a detailed legal analysis as though the court had presided over the trial of a Section 7 case (A17-21).

The court of appeals' reasoning in this portion of its opinion is indistinguishable from the "purposes of the decree" approach this Court emphatically rejected in *United States* v. *Armour & Co.*, 402 U.S. 673 (1971). Thus, the Second Circuit has simply resurrected an old mistake, which this Court should again set to rest. The modification or termination on consent of an old decree, even the entry of which is a discretionary act, should be no

occasion for the courts to create a new type of adjudicative proceeding.

MCI's contention, that Cyanamid's arguments would limit the court's role to that of a "rubber stamp" or render the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. §§ 16 (b-h) (1982), unconstitutional (Brief In Opposition submitted by MCI, hereinafter "MCI Brief," at 8, n. 8), is incorrect. Cyanamid maintains only that whatever the proper role for the court may be in ruling on a joint motion to terminate or modify a decree, it is plain error to impose an adjudicative standard that is qualitatively different from and more demanding than that of the APPA. As we have already pointed out, hundreds of decrees have been modified or terminated under the approach followed by the district court in this case (petition at 9-12). Although the APPA does not apply here, both the Government and the district court determined to treat this matter in accordance with the standards and procedures required by that statute, which they unquestionably fulfilled. No more should be required.[3]

2. The nature of the remand proceedings mandated by the Second Circuit illustrates the perversity of its ruling. Since both the Government and Cyanamid agree that the decree is anticompetitive and should be terminated, on remand MCI will presumably seek to assume the role of prosecutor in support of the continuation of this decree, with the Government and Cyanamid in opposition.

3. In fact, the Constitutional issues are more pointed in this context than when the court is asked to enter a new consent decree (petition at 19). In that situation, the Government is invoking judicial processes in aid of its enforcement decision. Consequently, a court may more properly refuse to put its imprimatur on a proposed new decree that it considers to be the product of impropriety or inadequate consideration, so long as it does not intrude on the prosecutorial discretion of the Executive Branch. On the other hand, when the Government moves to terminate a decree it no longer considers deserving of enforcement, a court that refuses to terminate must either direct the Government to continue to police compliance with the decree or itself assume the prosecutorial function—in either case an affirmative invasion of the Executive Branch's role.

B. The So-Called "Narrow" Holding That Courts May Disregard The Parties' Understanding Of Their Own Consent Decree Is Itself A Ruling Which Warrants This Court's Attention.

Even if the court of appeals had, as respondents contend, rested its decision entirely on an interpretation of Part XI of this decree, its handling of that provision demonstrates the breadth of its holding, not its narrowness.

As noted, only MCI attempts to justify the appellate court's outright rejection of the interpretation of that provision urged by the parties who drafted it and found by the district court to be factually correct.[4] Both Cyanamid and the Government have repeatedly explained—to the district court, to the court of appeals and to this Court—that the drafters of the decree recognized the difficulty of modification at the sole request of the defendant under the standard set out in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), and therefore agreed upon a *special standard* to apply in the event of Cyanamid's *unilateral* application.[5] However, at MCI's urging, the Second Circuit construed the termination language of Part XI as preclusive, making the so-called

4. MCI's tortured textual analysis of the decree is wrong at every turn. First, the proviso in question simply does not say, as MCI baldly insists, that relief from the purchase requirement may "only" be granted if Cyanamid makes the specified showing (MCI Brief at 3). The actual language requires termination upon a certain showing by Cyanamid, but does not preclude relief on other bases, or speak at all to the standard applicable when both parties seek to end the entire decree pursuant to Part XV. No provision, other than Part XV (in which the court was given continuing jurisdiction to modify or terminate) could conceivably have been thought necessary for what the parties now seek.

Furthermore, MCI's reference to other provisions of the decree, in Part XIII, is misleading and inaccurate. Those are not, as MCI asserts, "modification" clauses at all (MCI Brief at 11). Unlike Part XI, those sections have nothing to do with changing or ending the decree, but merely provide a mechanism for Cyanamid to make certain otherwise prohibited acquisitions without resort to the court. If the Government gave its consent to a particular acquisition under Part XIII, the provision itself would remain in effect.

5. The parties' account of their intent in drafting Part XI as they did is not only consistent with the language they used, it is consistent also with the advice of what was, in 1964, the leading commentary on consent decree practice:

Section 7 standard set forth therein the sole basis for terminating the purchase requirement, even where both parties seek relief from the entire decree.

The substitution of a new decree interpretation at the appellate level is precisely what this Court forbade in *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23-24 (1959), where it stated:

> We . . . hold that where the language of a consent decree in its normal meaning supports an interpretation; where that interpretation has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start; and where the trial court concludes that this interpretation is in fact the one the parties intended, we will not reject it simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place.

Thus, even as respondents would construe the Second Circuit's ruling, it is directly in conflict with consent decree law as enunciated by this Court.

Respondents try to minimize the importance of the decision by focusing on the allegedly unusual nature of the provision at issue. That is not the relevant inquiry, however, for the court of appeals' *de novo* approach to decree interpretation was not limited to modification provisions and therefore would apply equally to any provision of any decree that might come before a district court. To illustrate, under the Second Circuit's rationale, the district court in *United States* v. *Armour & Co., supra*, would have been free on its own motion or at the request of a third-party to expand that decree's prohibition on engaging in certain lines of business,

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> The reported cases . . . indicate rather strongly that, *absent special language establishing more liberal standards than are implicit in the usual retention-of-jurisdiction clause*, neither plaintiff nor defendant in an antitrust case can realistically expect to achieve the *unilateral modification* of a consent decree.

Dabney, Antitrust Consent Decrees: How Protective An Umbrella?, 68 YALE L.J. 1391, 1396-97 (1959) (footnotes omitted, emphasis added). *See also*, Donovan and McAllister, Consent Decrees In The Enforcement Of Federal Anti-Trust Laws, 46 HARV. L. REV. 885 (1933).

even though it could not do so at the urging of the Government. Similarly, by the reasoning of the decision below, the calculation of dividends under the consent decree in *United States* v. *Atlantic Refining Co., supra*, or the issue of whether a voting trust was permissible under the decree in *Hughes* v. *United States*, 342 U.S. 353 (1952), would turn, not on the intent of the parties or the language of the decree itself, but on a court's independent views of how best to effectuate the law enforcement "purposes" of the original litigation.

In short, even the purportedly narrow construction of the decision below urged by respondents blunts neither of the two justifications Cyanamid has already advanced for granting certiorari. For a court to "construe" a decree provision as to which the parties have no dispute both contravenes the Constitution's case and controversy limitation on Article III jurisdiction and denies the contractual essence of the decree. As already shown, it is also improper on both of those scores to require the parties to litigate a case they settled by consent years ago. These arguments have met with no answer from the respondents, and clearly deserve this Court's attention.[6]

II

The Decision Below Is Not Interlocutory With Respect To The Issues Presented On This Petition.

Both respondents suggest that review may be premature because the Second Circuit's decision is interlocutory and, "proceedings on remand may still result in termination of this decree" (U.S. Brief at 10). The point is not well taken. The precedents

6. The suggestion that Cyanamid's Constitutional arguments were not raised below is curious indeed. While that contention, even if true, would not be grounds for denying review of a Constitutionally defective jurisdictional decision, Cyanamid has in fact argued at every level that a joint request to terminate a consent decree does not place the original complaint in issue and that the Government's support for the request is entitled to great weight. *See, e.g.*, Brief for Defendant-Appellee and Cross-Appellant American Cyanamid Company, as submitted on the appeal to the Second Circuit, at 15-20, Argument I.

are clear that this Court will review an interlocutory decision on an important issue of law that is fundamental to the further conduct of the case. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). The issue presented here is clearly important for the reasons discussed at 8-19 of the petition, and it is hard to imagine a decision more fundamental to the further conduct of the case. The Second Circuit has directed the district court to define the relevant markets and "to apply the factors in *Brown Shoe*, *Fruehauf*, and other applicable cases" (A21). The summary of those factors in the court's opinion (A19) clearly indicates the burdensome scope of the proceeding that has now been ordered.

The *Catalano* case is squarely in point. There, this Court reviewed and reversed summarily an interlocutory court of appeals' ruling that a horizontal agreement on credit terms was subject to a "rule of reason" analysis rather than a rule of *per se* illegality, even though the agreement might have been found unlawful on remand after an exploration of all the facts pertinent to a rule of reason analysis.

The ruling below is final and ripe for review in every meaningful sense. The issue of what standard should apply when both parties urge termination of a consent decree is intrinsically a threshold question that has now been decided and will not likely be revisited on remand. *See Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949). *See also Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Marshall* v. *Occupational Safety & Health Review*, 635 F.2d 544 (6th Cir. 1980). Review by this Court can bring this matter—already pending for so many years—to a prompt close.

III

As The Government Suggests, The Clear Error Of The Decision Below Warrants Summary Reversal.

Finally, the Government has suggested summary reversal (U.S. Brief at 10, n. 10). Cyanamid concurs, because the decision of the Second Circuit—in requiring adjudicative proceedings, in rejecting the parties' interpretation of their own decree provisions and in adopting a new interpretation that is contrary to

the parties' original intention—embodies clear legal error of the type that has given rise to summary reversal in the past. *See, e.g., Central Trust Co.* v. *Creditors' Committee*, 454 U.S. 354 (1982) (summary reversal granted where the Second Circuit adopted an exception to the Bankruptcy Reform Act of 1978 which was a "wholly judicial creation"); *N.L.R.B.* v. *Brandman Iron Co.*, 368 U.S. 399 (1962) and *N.L.R.B.* v. *Las Vegas Sand & Gravel Corp.*, 368 U.S. 400 (1962) (summary reversal of Sixth and First Circuit decisions which, *sua sponte*, re-worded the terms of two separate consent decrees); *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 375 U.S. 39 (1963) (summarily reversing a Second Circut ruling, on a matter arising under the ASCAP antitrust consent decree, because that ruling ignored a prior decision of this Court on the same issue).

CONCLUSION

For the reasons stated herein and in the petition for a writ of certiorari, Cyanamid respectfully urges that the Court either grant the writ or reverse summarily.

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